Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

CATHERINE SEARS,

Petitioner,

vs.

BOARD OF REGISTRATION OF CHIROPRACTORS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the right to an impartial tribunal protected by the Due Process Clause requires reversal of a finding after a hearing by an administrative agency, revoking a license to practice chiropractic, whereby the same administrative agency held an ex parte communication prior to the hearing with the complainant and principal witness without notice to the affected party and without putting contents of the ex parte communication on the record.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Citations	ii
Opinion Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	7
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Gray v. Netherland, __ U.S. __, 116 S. Ct. 2074 (1996)	8
Morgan v. United States, 304 U.S. 1 (1937)	3, 7, 8

Statute Cited:

28 U.S.C. § 1257.	1

Contents

Page

United States Constitution Cited:

Amendment XIV, Section 1 1

Rule Cited:

Supreme Court Rule 14, Subparagraph 1(9)i 3

APPENDIX

Appendix A — Judgment of the Commonwealth of Massachusetts, Supreme Judicial Court for the Commonwealth at Boston Dated July 3, 1997 ..... 1a

Appendix B — Judgment of the Commonwealth of Massachusetts, Supreme Judicial Court for Suffolk County Dated December 17, 1996 ..... 4a

Appendix C — Memorandum of Decision of the Commonwealth of Massachusetts, Supreme Judicial Court for Suffolk County Dated December 17, 1996 ..... 5a

Appendix D — Judgment of the Commonwealth of Massachusetts, Supreme Judicial Court for Suffolk County Dated October 6, 1995 ..... 14a

Appendix E — Amended Judgment of the Commonwealth of Massachusetts, Supreme Judicial Court for Suffolk County Dated August 28, 1996 ..... 15a

Contents

Page

Appendix F — Final Decision and Order of the Commonwealth of Massachusetts, Supreme Judicial Court for Suffolk County Dated March 8, 1995 .... 16a

Catherine Sears, Petitioner, seeks a Writ of Certiorari to review the judgment and opinion of the Supreme Judicial Court of Massachusetts which affirmed the revocation of her license to practice chiropractic. The Petitioner's basis for this writ is that the Massachusetts Court denied relief to Petitioner for federal constitutional due process violations involving ex parte communications by an administrative agency; namely, the Massachusetts Board of Registration of Chiropractors.

OPINION BELOW

The opinion of the Massachusetts Supreme Judicial Court is reported as 425 Mass. 1011.

The memorandum opinion of Massachusetts Supreme Judicial Court, Single Justice is unpublished.

STATEMENT OF JURISDICTION

The opinion of the Massachusetts Supreme Judicial Court was filed on July 3, 1997.

The Court's jurisdiction is being invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Section 1 of the United States Constitution provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty or property with due process of law; . . .

STATEMENT OF THE CASE

The Massachusetts Board of Registration of Chiropractors revoked Dr. Sears' license to practice Chiropractic. This decision was appealed to the Single Justice of the Massachusetts Supreme Judicial Court. The decision of the Single Justice affirmed the decision of the Massachusetts Board of Registration of Chiropractors. Dr. Sears then appealed to the full bench of the Supreme Judicial Court.

The full bench of the Massachusetts Supreme Judicial Court agreed with the Single Justice that the Board of Registration of Chiropractors' communication with the complainant prior to the initiation of formal proceedings against the plaintiff by the same board was not improper, and did not violate the Code of Massachusetts regulations. This is a petition to review the decision of the full bench of the Supreme Judicial Court.

The facts of the case are as follows:

From May 4, 1989 to August 11, 1990, Dr. Catherine Sears, a chiropractor treated S.M. (patient/complainant). On October 17, 1991, S.M. filed an affidavit with the Board of Registration of Chiropractors complaining about her treatment by Dr. Sears. On June 10, 1992, the Board of Registration of Chiropractors held a hearing with S.M. The Board took one hour of testimony from S.M. The Board did not keep any records of this testimony. Dr. Sears was not notified of this hearing.

On January 31, 1994, the Board of Registration of Chiropractors issued a Notice to Show Cause against Dr. Sears. In April of 1994, Dr. Sears filed with the Board a Motion to Dismiss, and objected, among other things, to the communication held with S.M., the patient/complainant, without notice to herself. In September and October of 1994, the Board

of Registration of Chiropractors conducted a hearing and as a result of the hearing revoked Dr. Sears' license in March, 1995. The matter was appealed to the Single Justice of the Massachusetts Supreme Judicial Court on April 6, 1995.

On August 17, 1995, a Motion to Stay Revocation of License of Dr. Catherine Sears was filed, alleging a violation of constitutional due process because of the denial to be present, cross examine, and be represented by counsel at a hearing, the Board of Registration of Chiropractors held on June 12, 1992 with the patient/complainant to which Catherine Sears had no notice.

At the Single Justice hearing on October 4, 1995, Dr. Sears cited to the case of *Morgan v. United States*, 304 U.S. 1 (1937), both in the written brief and oral arguments to show that the ex parte communication by the Board of Registration of Chiropractors with S.M. constituted a violation of her (Dr. Sears) constitutional rights of due process. The Single Justice affirmed the decision of the Board of Registration of Chiropractors.

At the hearing of the full panel of the Supreme Judicial Court the issue was again presented citing *Morgan v. United States* as the standard. The Supreme Judicial Court affirmed the decision of the Single Justice.

Pursuant to Rule 14, Subparagraph 1(9)i, relative to when the federal questions sought to be reviewed were raised, the record shows the following:

In the Memorandum in Support of Petitioner's Request to Reverse Decision of Board of Registration of Chiropractors filed in the Massachusetts Supreme Judicial Court on June 6, 1996, the conclusion on page 20 of its memorandum stated:

> The Board of Chiropractors has a duty under the due process clause of the Fourteenth Amendment and under state law not to engage in undisclosed ex parte contacts. The Board took testimony from S.M. for the purpose of establishing facts. These facts have never been disclosed. On this basis alone, the decision of the Board of Registration of Chiropractors should be reversed.

In the Memorandum of Decision by the Single Justice of Massachusetts Supreme Judicial Court, Charles Fried, Associate Justice, did not address the question of violation of the Fourteenth Amendment raised in Appellant's Memorandum, but confined his remarks to the Massachusetts Regulations as follows:

> 1. Ex Parte Communication:
>
> The Petitioner cites 801 C.M.R. 1.03 for the proposition that the ex parte communications in this case were improper. By its terms, 801 C.M.R. 1.03 applies only to adjudicatory proceedings. The conference which occurred between the board and the complaining patient occurred more than one year before any formal action was taken by the board. The conference in question was not a hearing nor an opportunity to collect evidence for use against the petitioner in an adversarial hearing. Rather, the conference was used to determine if the allegations made by the patient were substantial enough to warrant the initiation of formal proceedings

> against the petitioner. Nothing that petitioner has cited suggests that the board may not conduct an investigatory interview with a complaining patient to determine if further action is warranted. See *Commissioner of Ins. v. First Nat. Bank of Boston*, 352 Mass. 74, 83 (1967).
>
> Petitioner argues that the evidence heard in that conference led to erroneous findings of fact because the complaining patient's interview was not in the record and therefore petitioner could not rebut any allegations made. First, petitioner had full access to the investigatory file the board had compiled. Any records made of that conference were contained in that file. Second, in the Order to Show Cause, the board presented the petitioner with the basic allegations against her. Third, the complaining patient testified at length in the hearing. At that time the petitioner had ample opportunity to hear all allegations made, conduct cross-examination, and present her own witnesses in rebuttal.

See App. 8 and App. 9.

In appellant's brief filed in the Supreme Judicial Court on February 14, 1997, appealing from a Judgment of the Single Justice Session of the Supreme Judicial Court of Suffolk County, appellant reiterated its claim that the Board of Registration of Chiropractors had a duty under due process clause of the Fourteenth Amendment not to engage in ex parte contacts.

In its judgment affirming the judgment entered by the Single Justice, the Massachusetts Supreme Judicial Court said in pertinent part:

> . . . We agree with the Single Justice that the board's informal investigatory conference with the complainant prior to the initiation of formal proceedings against the plaintiff was not improper. See *Commissioner of Insurance v. First National Bank*, 352 Mass. 74, 83 (1967) and did not violate 801 Code Mass. Regs. §1.03 (1993). Moreover, there is no reason to believe that the board based its decision on anything but the evidence adduced at the adjudicatory hearing. . . .

See App. 3.

The full panel of the Massachusetts Supreme Judicial Court also did not address the federal question.

As to the administrative agency's hearing; namely, the Board of Registration of Chiropractors, petitioner filed a Motion to Dismiss on April 9, 1994, complaining that:

> . . . The Board held an informal hearing with S.M. on June 10, 1992. Dr. Sears was not given notice of this hearing. The Board voted at that time to issue an Order to Show Cause to Dr. Sears. . . .

On May 2, 1994, in its notice of denial of the Motion to Dismiss:

> The Board further finds that the informal conference with the complainant held on

June 10, 1992 did not violate 801 CMR 1.01 (10)(f), because 801 CMR 1.01 (10)(f) applies only once a formal disciplinary proceeding has actually begun. The Board notes that the purpose of both the informal conference with the complainant on June 10, 1992 and a similar informal conference with the Respondent on March 25, 1992 was to elicit additional facts necessary to determine whether any formal disciplinary proceeding should take place, not to finally adjudicate the merits of the complaint.

REASONS FOR GRANTING THE WRIT

The Massachusetts Supreme Judicial Court opinion directly conflicts with the U.S. Supreme Court case of *Morgan v. United States*, 304 U.S. 1, 18, 22 (1937) which holds that administrative agencies may not engage in undisclosed ex parte communications.

The Massachusetts Supreme Judicial Court is making an assault on *Morgan v. United States*, 304 U.S. 1, and is saying that an administrative agency acting as an impartial tribunal may conduct ex parte hearings without the necessary safeguards of notice and/or disclosure.

The fact that the Board of Registration of Chiropractors did not separate investigatory functions from adjudicatory functions is constitutionally improper.

The same board that constituted itself as an impartial tribunal conducted a hearing to determine certain facts but had already heard testimony from the complainant and principal witness at a hearing to which no notice was given to the affected

party, and the contents of such hearing, despite repeated requests, were never disclosed on the record or to Dr. Sears.

The Single Justice ruled and the full panel agreed that the "board's informal investigatory conference with the complainant prior to the initiation of formal proceedings against the plaintiff was not improper. Moreover, there is no reason to believe that the board based its decision on anything but the evidence adduced at the adjudicatory hearing".

The last sentence of the full panel expresses the hope that there was no evidence let in the adjudicatory hearing that was taken in the investigation part of the hearing.

That holding does not meet the standard set forth in *Morgan v. United States*, 304 U.S. 1, 22 (1937) which says that "Undisclosed ex parte communication by an Administrative Agency is more than an irregularity in practice, it is a vital defect."

In her dissent in the case of *Gray v. Netherland*, __ U.S. __, 116 S. Ct. 2074, 2090 (1996), Justice Ginsburg writes:

> . . . *Morgan v. Unites States*, 304 U.S. 1, 18 58 S. Ct. 773, 776, 82 L.Ed. 1129 (1938) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."). Absent a full fair potentially effective opportunity to defend against the States charges, the right to a hearing would be "but a barren one."

Joining Justice Ginsburg in this dissenting opinion were Justice Stevens, Justice Souter, and Justice Breyer.

Counsel for Petitioner could find no case where the Supreme Court of the state sanctioned an Administrative Agency to conduct both an investigation and adjudicatory hearing, without either notice to the party affected or to put on the record all the evidence obtained at the ex parte hearing.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT FOR THE COMMONWEALTH AT BOSTON DATED JULY 3, 1997

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
FOR THE COMMONWEALTH
AT BOSTON,

July 3, 1997

IN THE CASE NO. SJC-07366

CATHERINE SEARS

vs.

BOARD OF REGISTRATION OF CHIROPRACTORS

pending in the Supreme Judicial Court for the County of Suffolk, No. SJ-95-0174

ORDERED, that the following entry be made in the docket; viz., —

Judgment affirmed.

BY THE COURT,
s/ Susan Mellen,
Assistant Clerk

July 3, 1997

Appendix A

SJC-07366

CATHERINE SEARS

vs.

BOARD OF REGISTRATION OF CHIROPRACTORS

July 3, 1997

Chiropractor.
Board of Registration of Chiropractors.

The plaintiff appeals from a judgment entered by a single justice of this court affirming a decision of the Board of Registration of Chiropractors (board) revoking her license to practice chiropractic in the Commonwealth. See G. L. c. 112, § 64. The board conducted adjudicatory hearings and determined that the plaintiff had used improper practices that were beyond the scope of chiropractic, used techniques and procedures that were not proper supportive procedures, failed to consult with the complainant's medical doctors when her condition warranted, and improperly charged an excessive copayment. The board concluded that these acts of misconduct warranted imposition of discipline.

The single justice issued a thorough memorandum of decision addressing each of the plaintiff's challenges to the board's decision. There was substantial evidence that supported the board's decision, and we do not find that the single justice abused his discretion or made an error of law. We agree with the single justice that the board's informal investigatory conference with the complainant prior to the initiation of formal proceedings

against the plaintiff was not improper, see *Commissioner of Ins. v. First Nat'l Bank*, 352 Mass. 74, 83 (1967), and did not violate 801 Code Mass. Regs. § 1.03 (1993). Moreover, there is no reason to believe that the board based its decision on anything but the evidence adduced at the adjudicatory hearing. The plaintiff's other challenges to the rulings of the single justice are without merit. Where the single justice adequately dealt with these contentions, it is not necessary for this court to restate his analysis. *Moustafa v. Board of Registration in Medicine*, 424 Mass. 1014, 1014 (1997).

Judgment affirmed.

Arthur K. Ross, Jr., for the plaintiff.

Kristin E. McIntosch, Assistant Attorney General, for the Board of Registration of Chiropractors.

APPENDIX B — JUDGMENT OF THE COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY DATED DECEMBER 17, 1996

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT FOR
SUFFOLK COUNTY
SJ-95-0174

CATHERINE SEARS

vs.

BOARD OF REGISTRATION OF CHIROPRACTORS

JUDGMENT

This matter came before the Court, Fried, J., presiding, and in accordance with the Memorandum of Decision of this date:

It is ORDERED and ADJUDGED that the petition pursuant to G.L. c. 112, 64, be, and the same hereby is, denied.

By the Court (Fried, J.)
s/ Maura Doyle
Clerk

Entered: December 17, 1996

APPENDIX C — MEMORANDUM OF DECISION OF THE COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY DATED DECEMBER 17, 1996

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPREME JUDICIAL COURT FOR
SUFFOLK COUNTY

CATHERINE SEARS

vs.

BOARD OF REGISTRATION OF CHIROPRACTORS

MEMORANDUM OF DECISION

Petitioner challenges the revocation of her license to practice chiropractic by the Board of Registration of Chiropractors (board). Petitioner has sought judicial review pursuant to G. L. c. 112, § 64 (1994 ed.).

In response to a patient's complaint, the board began an investigation of the petitioner. The board held informal conferences with both the patient, on June 10, 1992, and the petitioner, on March 25, 1992. Afterwards, the board discussed the matter with petitioner's counsel and allowed counsel to inspect the board's file. On January 31, 1994, the board initiated formal proceedings and issued an Order to Show Cause why her license should not be suspended or revoked. After a motion for a more definite statement, the board sent petitioner an amended order alleging the following four violations of G. L. c. 112, § 61 (1994 ed.) and a further violation related to

overcharging: (1) use of improper practices such as harmonics and daily affirmations; (2) use of improper "supportive procedures" independent of primary chiropractic procedure; (3) false representation to her patient that a spinal tumor was merely scar tissue which could be improved by chiropractic services; (4) overutilization of services without improving the patient's condition, without altering the course of treatment, and without making necessary referrals to other practitioners; and (5) improper co-payment charges of twice the amount approved by the insurance company. The board then responded to interrogatories and requests for documents made by the petitioner.[1]

In September and October of 1994, the board conducted adjudicatory hearings. The petitioner was represented by counsel and produced five witnesses and submitted five exhibits. On March 8, 1995, the board, finding that the petitioner committed several acts of misconduct, issued its decision revoking petitioner's license. The board found that the petitioner used techniques beyond the scope of chiropractic such as iridology[2] and directing energy,[3] used techniques that are not proper supportive techniques such as affirmations,[4] failed to consult

1. Petitioner claims the board's responses were inadequate which gave her improper notice of the charges against her. This claim of error is part of her claim of lack of due process and is addressed in that section of this opinion.

2. This is the practice of looking into the patient's eyes to evaluate the internal organs.

3. This is the practice of circling one's hands over the patient without touching her to aid in healing.

4. Affirmations are the repetition of phrases apparently meant to reduce stress and cleanse the body of negative energy.

with and refer the patient to a medical doctor when the patient's condition warranted, and improperly charged an excessive co-payment. The board found the evidence of the use of crystals and/or harmonics inconclusive. The board also found the evidence that petitioner falsely represented the patient's tumor as only scar tissue to be inconclusive as well.

Petitioner makes four claims of error in the proceedings: (1) that the board improperly made ex parte contact with the complaining patient which led to erroneous findings of facts against the petitioner; (2) that the board failed to secure a just and speedy resolution of the matter; (3) that the finding that the petitioner improperly used harmonics is unconstitutionally vague because harmonics is not defined; and (4) that the petitioner did not receive due process because she did not have notice of the charges against her. Although it is unclear from her brief, the petitioner may also be alleging lack of substantial evidence.[5]

1. *Ex Parte Communication*:

The petitioner cites 801 C.M.R. 1.03 for the proposition that the ex parte communications in this case were improper. By its terms, 801 C.M.R. 1.03 applies only to adjudicatory proceedings. The conference which occurred between the board and the complaining patient occurred more than one year before any formal action was taken by the board. The conference in

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5. Petitioner also requests that Exhibit C of the board's memorandum to this court be struck. Exhibit C is a copy of the board's current regulations which were adopted after the petitioner's misconduct. The board also provided the regulations in effect at the time of the conduct. This court is aware that any changes in the newer regulations cannot be used against the petitioner, and any such changes played no role in this decision.

question was not a hearing nor an opportunity to collect evidence for use against the petitioner in an adversarial hearing. Rather, the conference was used to determine if the allegations made by the patient were substantial enough to warrant the initiation of formal proceedings against the petitioner. Nothing that petitioner has cited suggests that the board may not conduct an investigatory interview with a complaining patient to determine if further action is warranted. See *Commissioner of Ins. v. First Nat. Bank of Boston,* 352 Mass. 74, 83 (1967).

Petitioner argues that the evidence heard in that conference led to erroneous findings of fact because the complaining patient's interview was not in the record and therefore petitioner could not rebut any allegations made. First, petitioner had full access to the investigatory file the board had compiled. Any records made of that conference were contained in that file. Second, in the Order to Show Cause, the board presented the petitioner with the basic allegations against her. Third, the complaining patient testified at length in the hearing. At that time the petitioner had ample opportunity to hear all allegations made, conduct cross-examination, and present her own witnesses in rebuttal.

2. *Due Process:*

Petitioner makes a similar argument under the rubric of due process. The gravamen of the petitioner's argument is that she lacked notice that specific allegations would be made and therefore she lacked the opportunity to mount a full defense. She stated that the Order to Show Cause only spoke generally of improper practices and improper supportive procedures rather than clearly specifying that her use of iridology, directing energy, and affirmations would be the subject of the hearing. Petitioner

continually made efforts to obtain a more specific list of the allegations. However, the court has stated that "[d]ue process does not require an administrative agency to provide interested parties with a detailed description of evidence it intends to introduce at a disciplinary hearing. . . . [I]f [petitioner] was surprised by, or unprepared to respond to, any of the grounds for discipline raised by the board at the hearing, [s]he could have requested a continuance or the opportunity to present additional evidence and argument after the hearing." *Langlitz v. Board of Registration of Chiropractors,* 396 Mass. 374, 377-378 (1985). The petitioner had notice of the hearing and the basic allegations. She had counsel, the opportunity to cross-examine witnesses, and a full opportunity to be heard and present evidence. She heard all evidence against her at the hearing, and she had an opportunity to ask for a continuance if she was unprepared to defend herself against an allegation. In this context, due process requires no more.

3. *No Just and Speedy Resolution:*

The board did not send the initial Order to Show Cause to the petitioner until nineteen months after the conference with the complaining patient after which the board voted to send the order. Petitioner cites *Weiner v. Board of Registry of Psychologists,* 416 Mass. 675, 681-683 (1993), in support of the proposition that the delay requires setting aside of the board's decision. The delay in this case is qualitatively different from that in the *Weiner* case. In that case, the petitioner's appeal was argued some twenty-one years after the alleged conduct. The initial decision of the board in that case came sixteen years after the alleged misconduct and after four letters to the petitioner stating that the proceedings had been dismissed. Here the delay was only nineteen months and no misleading conduct such as letters of dismissal was directed to the petitioner.

Appendix C

Delay alone is insufficient to warrant setting aside the board's decision. G. L. c. 30A, § 14(7) authorizes the court to set aside the decision if "the substantial rights of any party have been prejudiced." Thus, the petitioner must show prejudice, *Weiner, supra* at 680, which she has failed to do. The prejudice alleged by the petitioner is the death of Dr. Rees who she contends would corroborate her testimony. Dr. Rees, however, died on April 4, 1992, before the board had its conference with the patient. Therefore, the board's investigation was incomplete at that time, and it could not have issued the order before Dr. Rees died. The delay the petitioner complains of occurred several months later.

4. *Vagueness of Term Harmonics:*

The board's decision did not rest on the practices considered to be harmonics, which apparently covers, at least in part, use of crystals in treatment. The board found the evidence of the use of crystals insubstantial and did not base its decision on this ground. The board did not discipline petitioner for the use of harmonics.

The board did rely in part on the use of affirmations, and the petitioner claims that the only policy regarding affirmations about which she was aware was policy against using affirmations in conjunction with harmonics. Petitioner's argument is that affirmations in conjunction with harmonics cannot be the basis for discipline because harmonics lacks a definition. The affirmations in this case were not related to the use of harmonics so the definition of harmonics is irrelevant. Thus the petitioner is left with the argument that because affirmations were specifically prohibited in one context by the board, they must be acceptable in others. Simply because the board specifically

prohibited the use of affirmations in one context does not mean that the board cannot find their use constitutes professional misconduct in another context even though not specifically prohibited in writing by the board. The board acted within its discretion in determining that affirmations were outside the scope of chiropractic, as defined by G. L. c. 112, §89.[6] Nothing in the statutory definition of chiropractic suggests that affirmations are within the scope of treatment permitted. Uncontroverted expert testimony suggested that affirmations are not taught in chiropractic schools and are not considered a normal and accepted part of chiropractic treatment. In addition, the board gave several other grounds for revoking the petitioner's license so that any error in this regard would have caused no prejudice.

5. *Substantial Evidence:*

Although petitioner never explicitly makes the argument that the board lacked substantial evidence for its charges, the petitioner complains about the board's finding in several places

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6. G. L. c. 112, §89 defines chiropractic as:

> "the science of locating, and removing interference with the transmission of or expression of nerve force in the human body, by correction of misalignments or subluxations of the bony articulation and adjacent structures, more especially those of the vertebra column and pelvis, for the purpose of restoring and maintaining health. . . . Nothing in this definition shall exclude the use of supportive procedures and therapy, including braces, traction, heat, cold, sound, electricity, and dietary and nutritional advice, as treatment supplemental to a chiropractic adjustment."

in her brief and states that the board ignored compelling evidence supporting the petitioner. This court's role on review is to consider the entire record and set aside the decision only where the findings are not supported by substantial evidence. G. L. c. 30A, § 1 (6).

The board found misconduct in six separate areas: use of iridology, use of healing circles or directing energy, use of affirmations, treatment over the telephone and by proxy, failure to refer to a medical doctor when required, and overbilling. As to the use of iridology, petitioner claims to have looked into the patient's eyes as a diagnostic tool, but did not use this to evaluate the patient's internal organs, as is the practice in iridology. The patient contradicted this testimony and testified that petitioner informed her that she was using iridology to check the internal organs. The patient also testified as to the directing energy and the use of affirmations. The patient's testimony as to directing energy and affirmations was corroborated by other patients and materials given to the patient by petitioner. As to the treatment over the phone, the board relied on the patient's testimony and a message from the petitioner recorded on the patient's answering machine. As this summary and an examination of the record demonstrate, the board relied on ample evidence to make each of its findings as to disputed facts.

Petitioner admitted the conduct underlying the other charges but defends by explaining that the conduct was not professional misconduct. Petitioner had the patient treated by an unlicensed practitioner who was also a chiropractor. Petitioner claims not to have known that the referral was to a practitioner unlicensed in Massachusetts. The other chiropractor was licensed in another state. Petitioner admits not referring the patient to a medical doctor even when the pain was increasing and petitioner had treated the patient over forty times. The petitioner claims that

she had no duty to refer because the patient was already under the care of the doctors who originally diagnosed the tumor. Petitioner also admits to the overbilling but claims it was only a clerical error. Where petitioner admitted the misconduct but had an explanation which made her appear less culpable, the board, which heard the evidence and the testimony, is in the best position to assess the credibility of these explanations. Where the conduct was admitted and there is no question except as to the veracity of the explanation, there is no real question for the court to review.

Three experts testified, one for the board and two for the petitioner, on the issue of whether the alleged conduct was beyond the scope of chiropractic. The experts, even the petitioner's, agreed that most of the conduct alleged extended beyond the scope of acceptable chiropractic. Therefore, there can be no question that the board relied on substantial evidence in determining that the conduct shown was gross professional misconduct.

A judgment is entered denying the petitioner's motion and affirming the board's decision.

s/ Charles Fried
Associate Justice

Entered: December 17, 1996

APPENDIX D — JUDGMENT OF THE COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY DATED OCTOBER 6, 1995

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SJ-95-0174

CATHERINE SEARS

vs.

BOARD OF REGISTRATION OF CHIROPRACTORS

JUDGMENT

This matter came before the Court, O'Connor, J., on a petition for review pursuant to G.L. c. 112, s. 64 and the petitioner's motion to stay revocation of license. There was argument by counsel and upon consideration thereof, it is ORDERED that the petition for review and the motion to stay be, and the same hereby are, denied.

By the Court, (O'Connor, J.)
c/ Maura Sweeney Doyle
Assistant Clerk

Entered: October 6, 1995

APPENDIX E — AMENDED JUDGMENT OF THE COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY DATED AUGUST 28, 1996

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY

SJ-95-0174

CATHERINE SEARS

vs.

BOARD OF REGISTRATION OF CHIROPRACTORS

AMENDED JUDGMENT

This matter came before the Court, O'Connor, J., on the petitioner's motion to stay revocation of license. There was argument by counsel and upon consideration thereof, it is ORDERED that the motion to stay be, and the same hereby is, denied.

By the Court, (O'Connor, J.)
-c/ Maura Sweeney Doyle
Assistant Clerk

Entered: August 28, 1996

APPENDIX F — FINAL DECISION AND ORDER OF THE COMMONWEALTH OF MASSACHUSETTS, SUPREME JUDICIAL COURT FOR SUFFOLK COUNTY DATED MARCH 8, 1995

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

DOCKET NO. CH 92-028

BOARD OF REGISTRATION
OF CHIROPRACTORS

IN THE MATTER OF

Catherine Sears, D.C.

FINAL DECISION AND ORDER

Summary of Proceedings

On January 31, 1994, the Board of Registration of Chiropractors (hereinafter "the Board") initiated this formal adjudicatory proceeding by issuing an Order to Show Cause (hereinafter the "Order") to Catherine Sears, D.C. (hereinafter the "Respondent"). That Order to Show Cause directed the Respondent to appear and show cause why her license to practice chiropractic (License Number 475) should not be revoked or suspended, and alleged that she had engaged in "gross misconduct in the practice of chiropractic", in violation of Chapter 112, Section 61 of the Massachusetts General Laws, in conjunction with her treatment of patient S.M.. In response to that Order to Show Cause, the Respondent filed a Motion for More Definite Statement on February 17, 1994. On March 18,

1994, the Board issued an Amended Order to Show Cause on the Respondent, again directing the Respondent to appear and show cause why her license to practice chiropractic should not be suspended or revoked, pursuant to Chapter 112, Sections 61 and 93 of the Massachusetts General Laws and the Board's regulations at 233 CMR 4.00 et. seq., based upon the following allegations:

(1) That the Respondent violated G.L. c. 112, s. 61 by engaging in improper practices which extended beyond the scope of "chiropractic", as defined in G.L. c. 112, s. 89, including the use of harmonics and daily affirmations in her treatment of S.M.;

(2) That the Respondent violated G.L. c. 112, s. 61 and 233 CMR 4.03 by improperly using "supportive procedures", as defined in G.L. c. 112, s. 89 and 233 CMR 4.03, independent of primary chiropractic procedure;

(3) That the Respondent violated G.L. c. 112, s. 61 and 233 CMR 4.05, 233 CMR 4.08, 233 CMR 4.09 and 233 CMR 4.13 by falsely representing to S.M. that a tumor on her spinal column was merely scar tissue and that it had been and/or would be improved by the chiropractic treatment the Respondent was providing to S.M.;

(4) That the Respondent violated G.L. c. 112, s. 61, and engaged in overutilization of services in violation of 233 CMR 4.06 as well, by treating S.M. on more than 50 occasions over a fifteen month period from May, 1989 to August, 1990 without significantly improving her condition, without properly altering the course of her treatment, and without making necessary referrals to other practitioners; and

(5) The Respondent violated G.L. c. 112, s. 61 by improperly charging S.M. a copayment of twice the amount approved by S.M.'s insurance company.

On or about April 8, 1994, the Respondent filed an Answer to the Board's Order to Show Cause, in which she denied all of the above allegations. The Respondent also filed a Motion to Dismiss, alleging that the Board had improperly delayed the issuance of the Order to Show Cause and that the Board had acted improperly in holding an informal conference with S.M. on June 10, 1992 without affording notice and an opportunity to be present to the Respondent. This Motion was denied by the Board on May 2, 1994, on the grounds that the delay in the issuance of the Order to Show Cause in these proceedings was factually distinguishable from the delay in *Weiner v. Board of Registration of Psychologists*, __ Mass. __, (1993), relied on by the Respondent, and had not resulted in any prejudice to the Respondent; and that the informal conference in question was not held to finally adjudicate the merits of S.M.'s complaint against the Respondent.

Both parties subsequently filed Motions for Leave to Serve Interrogatories and Requests for Production of Documents, which were granted by the Board.

Following these preliminary proceedings, the Board conducted an adjudicatory hearing on the merits of the allegations contained in the Amended Order to Show Cause on September 28 and 29 and October 12, 1994. This hearing was conducted according to the Standard Adjudicatory Rules of Practice and Procedure (801 CMR 1.00 et seq.). The Respondent appeared personally at the hearing and was represented by counsel. The following witnesses testified at the hearing:

Appendix F

For the Board Prosecutor:

(1) The Respondent's patient, S.M.;

(2) Rand O. Torman, D.C.

For the Respondent:

(1) Catherine Sears, D.C., the Respondent;

(2) Kenneth White

(3) David Wiley

(4) Marcia Kasabian, D.C.

(5) Ellen Blomerth, D.C.

The following documents and exhibits were introduced into evidence at the hearing:

Exhibit 1 — First Amended Order to Show Cause

Exhibit 2 — Respondent's Answer to Order to Show Case

Exhibit 3 — Notice of Hearing

Exhibit 4 — Record of Standing on Respondent

Exhibit 5 — Medical Notes of David B. Lovejoy, M.D., regarding S.M.

Appendix F

Exhibit 6 — Medical Records of Robert G. Ojerman, M.D., regarding S.M.

Exhibit 7 — Respondent's Treatment Records regarding S.M.

Exhibit 8 — 80 Protocol 10 31 89 Explained

Exhibit 9 — The 34 positive Volitions for White light Shield

Exhibit 10 — Results of Hair Analysis on S.M.

Exhibit 11 — Respondent's Billing Records for S.M.

Exhibit 12 — Complaint Affidavit of S.M.

Exhibit 13 — Respondent's Response to Complaint Affidavit of S.M.

Exhibit 14 — Crystal Furnished to S.M.

Exhibit 15 — Letter and Crystal of Pamela Rhoades

Exhibit 16 — Telephone Bill of S.M., 8/6/90 to 9/5/90

Exhibit 17 — Medical Records of Massachusetts General Hospital regarding S.M.

Appendix F

Exhibit 18 — Affidavit of Julie Pierce

Exhibit 19 — Tape of Telephone Message from Respondent to S.M.

Exhibit 20 — Letter from S.M. to Respondent and Dr. Rees, dated 4/22/91

Exhibit 21 — Affidavit of Susan Mack

Exhibit 22 — Affidavit of Victoria Lee

Exhibit 23 — Affidavit of Fred MacVittie

Exhibit 24 — Letter from Respondent Attaching Obituary of Dr. Rees

Exhibit 25 — Curriculum Vitae of Rand Torman, D.C.

Exhibit 26 — Board Policy Memorandum Dated 5/11/84

Exhibit 27 — Board Regulations Dated 12/31/86

Exhibit 28 — Business Card of Respondent

Exhibit 29 — Affidavits From Various Patients of Respondent

Exhibit 30 — Curriculum Vitae of Marcia Kasabian, D.C.

Appendix F

Exhibit 31 — Curriculum Vitae of Ellen Blomerth, D.C.

Exhibit 32 — Affidavit of Candi Derderian

The decision of the board as to the merits of the allegations in the Amended Order to Show Cause, as set forth herein, was adopted by a vote of 6 -0 (Dr. Barowsky, Chairman; Drs. Caro, Davini, Giuliano, and Vitteriti, and Ms. Woodford in favor; none opposed). The decision of the Board as to sanction, as set forth herein, was adopted by a vote of 5-1 (Dr. Barowsky, Chairman; Drs. Caro, Davini and Viteriti and Ms. Woodford in favor; Dr. Giuliano opposed).

Findings of Fact

1. The Respondent, Catherine Q. Sears, D.C., has been licensed by the Commonwealth of Massachusetts as a chiropractor, holding License Number 475, since April 12, 1978. (Exhibit 4; Testimony of Respondent, Tr. II, p. 146; Board Records)

2. The Respondent received the Board's Amended Order to Show Cause, dated March 18, 1994, and filed an Answer to that Amended Order to Show Cause, in which she denied all of the allegations contained therein, on April 8, 1994. (Exhibits 1, 2)

3. The Respondent was personally present on all of the days of the hearing and was represented throughout by legal counsel. (Tr. I, II, III)

4. In the late summer of 1988, S.M. began experiencing pain in her leg and back. She initially sought and received chiropractic treatment for this pain from a Dr. Fantini, a chiropractor in Salem, Massachusetts. The treatment she received from Dr. Fantini consisted of regular, "hands-on" chiropractic adjustments of her back and neck. (Testimony of S.M., Tr. I, pp. 22-23)

5. In May, 1989, S.M. stopped treatment with Dr. Fantini because her condition was not improving. Sometime prior to March 27, 1989, and at Dr. Fantini's suggestion, S.M. had an x-ray done in an attempt to determine the cause of her discomfort. Based on the results of that x-ray, Dr. Fantini was of the opinion that S.M. had a spondylolisthesis, a deformity of the lumbar portion of the spinal column, and recommended that S.M. seek a second opinion regarding the cause of her discomfort. (Testimony of S.M., Tr. I, pp. 23-24; Exh. 5)

6. On March 27, 1989, S.M. first consulted David Lovejoy, M.D., a local orthopedist for a second opinion regarding her condition. Dr. Lovejoy examined S.M. at that time and recommended a magnetic resonance imaging test (MRI) to rule out nerve root pressure. (Testimony of S.M., Tr. I, p. 24; Exh. 5)

7. On or about May 4, 1989, an MRI was performed on S.M. as recommended by Dr. Lovejoy. Based on the results of that MRI, Dr. Lovejoy diagnosed S.M. as having a "possible tumor" at the second lumbar vertebrae, and further indicated that neurosurgery might be necessary. (Testimony of S.M., Tr. I, p. 24; Exh. 5)

8. On or about May 12, 1989, S.M. was seen by Sidney Paly, M.D., a neurosurgeon at Salem Hospital. Dr. Paly examined

S.M. and reviewed the results of the MRI which had been performed, and diagnosed S.M. as having an intradural tumor at the L1-L2 level. At that time, he discussed the possibility of surgery with S.M. (Testimony of S.M., Tr. I, pp. 24-25; Exh. 5)

9. On or about May 15, 1989, S.M. was seen by Robert Ojerman, M.D., at the Massachusetts General Hospital. At that time, Dr. Ojerman examined S.M., reviewed her history and the results of the MRI, and diagnosed her as having a localized tumor at the L1-L2 level, which he believed to be benign. At that time, Dr. Ojerman discussed the recommended surgical procedure with S.M., and noted that S.M. had not decided whether she would have the surgery. (Testimony of S.M., Tr. I, pp. 25-26; Exh. 6)

10. S.M. decided not to have the surgery at that time, and elected instead to take some time over the ensuing several weeks to consider other treatment options. (Testimony of S.M., Tr. I, p. 28)

11. On or about May 17, 1989, S.M. went to see the Respondent for the first time. At that time, S.M. informed the Respondent that she had seen Drs. Fantini, Lovejoy, Paly and Ojerman, and that she had been diagnosed as having a spinal tumor. S.M. also provided the Respondent with copies of her initial MRI films at that time. (Testimony of S.M., Tr. I, p. 42; Exh. 7)

12. At that first visit on May 17, 1989, S.M. also completed a form entitled "Confidential Patient Information", which contained basic identifying information, employment data, some medical history data, a statement of the patient's purpose in seeking this appointment, information about other doctors seen and medications taken, and insurance information. On that form,

S.M. entered "tumor growth in second lumbar", and the Respondent later added the words "want to heal self". (Testimony of S.M., Tr. I, pp. 32-35; Exh. 7)

13. In addition to the "Confidential Patient Information" form, S.M. also furnished the information needed to complete a two-page form entitled "Patient History Form", which included information about her chief and secondary complaints, her past history of surgical procedures and previous serious illnesses, information about medications and drugs taken, and previous courses of medical and chiropractic care. (Testimony of S.M., Tr. I, pp. 36-39; Exh. 7)

14. At that first visit on May 17, 1989, the Respondent performed a basic chiropractic examination of S.M., including an orthopedic examination, neurologic examination and cranial nerve examination. (Testimony of S.M., Tr. I, p. 39; Exh. 7)

15. In addition to this examination, the Respondent also performed a procedure on S.M. called "iridology". This procedure was described as one in which the Respondent would look into S.M.'s eyes and make an assessment of the condition of S.M.'s internal organs. The procedure did not involve any physical contact between the Respondent and S.M., either by hand or through the use of any instrument or tool. S.M. was also shown a book which described iridology and the procedure which the Respondent was performing. (Testimony of S.M., Tr. I, pp. 39-40)

16. The Respondent billed S.M. and her health insurer, Blue Cross/Blue Shield of Massachusetts, for an adjustment and an examination on May 18,1989. There is no indication in the Respondent's billing records that the iridology procedure was

billed separately or that it was not included in the services for which S.M. was billed on May 18, 1989. (Exh. 11)

17. The Board Prosecutor's expert witness, Rand Torman, D.C., testified that he did not receive any training in iridology in chiropractic college and that, although he knew what it was, he did not consider it to be within the scope of chiropractic. (Testimony of Rand Torman, D.C., Tr. II, p. 141)

18. The Respondent presented no expert testimony or evidence indicating that iridology was an accepted chiropractic procedure or that it was taught in chiropractic colleges.

19. Based on the evidence presented, the Board finds that iridology is not an accepted chiropractic diagnostic procedure in Massachusetts.

20. During the period from May 18, 1989 to approximately August 9, 1990, S.M. visited the Respondent's office for the purpose of obtaining treatment a total of 51 separate times, and the Respondent billed her for a total of 51 office visits. (Exhs. 7 and 11)

21. During a number of those office visits, the Respondent performed a procedure described as "healing circles" or "directing energy". This procedure involved the Respondent circling her hands above S.M.'s body, without making physical contact with S.M.'s body, and "directing energy" in a manner which allegedly promoted healing. (Testimony of S.M., Tr. I, pp. 45, 48, 171)

22. The Respondent discussed this "directing energy"

procedure to S.M. during one of S.M.'s office visits, showed S.M. a book which depicted and explained the procedure, and told S.M. that she wanted S.M. to "open up to" and "understand" this procedure and allow it to happen. (Testimony of S.M., Tr. I, pp. 48-49)

23. The Respondent's billing records regarding S.M. contain an entry dated June 16, 1989 in which S.M. was billed for an adjustment and an unspecified "book". The Board infers that the "book" for which S.M. was billed was the book on "directing energy" or "energy healing" referred to in Finding #22 above. (Exh. 11)

24. The available evidence indicates that the Respondent also used this "directing energy" procedure, in which she did not make physical contact with the patient's body, on other patients as well. (Exhibits 22, 23)

25. The Respondent's expert witness, Marcia Kasabian, D.C., testified that chiropractic is "hands-on" treatment, and that directing energy without touching the patient is not within the scope of chiropractic. (Testimony of Marcia Kasabian, D.C., Tr. III, p. 99)

26. The Respondent's other expert witness, Ellen Blomerth, D.C., also testified that directing energy and doing circles over a patient's body, is not an accepted chiropractic technique. (Testimony of Ellen Blomerth, D.C., Tr. III, p. 198)

27. On the basis of the evidence presented, the Board finds that the technique described as "directing energy" or "energy healing" is not an accepted form of chiropractic treatment or supportive procedure in Massachusetts.

Appendix F

28. During one of S.M.'s office visits, the Respondent told S.M. to say the phrase "I am forgiving" sixty times each day for the purpose of relieving tension and stress, specifically liver stress. Although the Respondent denied that this affirmation was actually part of S.M.'s chiropractic treatment per se, the Board finds that the Respondent's recommendation that S.M. repeat this affirmation was directly connected with the chiropractic treatment that S.M. was receiving, and was made for the purpose of increasing the effectiveness of that chiropractic treatment. (Testimony of S.M., Tr. I, p. 72; Testimony of Respondent, Tr. II, pp. 165-166, 235)

29. The Respondent admitted that she had also asked other patients to repeat affirmations such as the phrase "I am forgiving", and an affidavit from another patient introduced into evidence by the Board Prosecutor indicated that the Respondent did so. (Testimony of Respondent, Tr. II, p. 224; Exh. 32)

30. While S.M. was undergoing treatment with the Respondent, S.M. and the Respondent attended a conference of the International Systemic Health Organization in Phoenix, Arizona in late November, 1989, at which S.M.'s case was presented for consideration by the attendees and S.M. spoke to the attendees about the impact of the care she had received on her condition. (Testimony of Respondent, Tr. II, pp. 162-165)

31. At that conference, S.M. received a copy of a three-page document entitled "The 34 Positive Volitions for Protocol White Light Shield", which contained 34 numbered statements or "affirmations". One of the affirmations contained in this document entitled "The 34 Positive Volitions for Protocol White Light Shield", reads "Acceptance Faith. I have an excellent doctor about whom I must have complete faith that everything

he does for me is for my very best and I will trust everything he directs me to do". S.M. believed that the Respondent was the doctor referred to in this document. (Testimony of S.M., Tr. I, p. 78; Exh. 9)

32. Although the Respondent denies having done so, S.M. testified that the Respondent told her to say at least some of the affirmations contained in "The 34 Positive Volitions for Protocol White Light Shield" on a daily basis. In view of the Respondent's admission that she had asked S.M. and other patients to say other affirmations, the Board finds S.M.'s testimony on this point credible. (Testimony of S.M., Tr. I, pp. 75-78; Exh. 9; Testimony of Respondent, pp. 162-165, 235; Exh. 32)

33. The Board issued a policy memorandum to all licensed chiropractors in Massachusetts on or about May 11, 1984 stating that "...utilization of quartz crystals and/or harmonics, or associated affirmations as a primary or supportive procedure in the office is considered by this Board to be outside the scope of chiropractic as defined by the Great and General Court of Massachusetts, c. 112, s. 89 M.G.L.". A copy of the Board's regulations and policies in effect as of December 31, 1986 contained essentially the same statement. (Exhs. 26, 27)

34. The Respondent admitted that she had received this Board policy memorandum concerning use of quartz crystals, harmonics, or associated affirmations. (Testimony of Respondent, Tr. II, p. 225)

35. Both the Board Prosecutor's expert witness, Dr. Torman, and one of the Respondent's expert witnesses, Dr. Blomerth, testified that the use of affirmations in connection with treatment of a patient in the course of the chiropractic-patient relationship

is not an accepted practice. In addition, the Respondent's other expert witness, Dr. Kasabian, acknowledged that the use of affirmations was "not part of a normal treatment program" and was not taught in chiropractic colleges. (Testimony of Rand Torman, D.C., Tr. II, pp. 61-62; Testimony of Ellen Blomerth, D.C., Tr. III, pp. 184-185, 193; Testimony of Marcia Kasabian, D.C., Tr. III, pp. 101-102)

36. On the basis of the evidence presented, the Board finds that the use of affirmations is not an accepted chiropractic treatment technique or supportive procedure, and is not within the scope of chiropractic practice.

37. At some point while she was a patient of the Respondent, S.M. purchased a quartz crystal from the Respondent's husband, Thomas Sears, at a cost of approximately twenty-five dollars ($25.00) (Testimony of S.M., Tr. I, p. 232)

38. The evidence is insufficient to support a conclusion that this crystal was furnished to S.M. in connection with the chiropractic treatment she was receiving from the Respondent. At one point, S.M. testified that the Respondent told her that the crystals were used as a facilitator in the healing process, but acknowledged that this conversation had not taken place in the Respondent's office or during one of S.M.'s appointments. (Testimony of S.M., Tr. I, pp. 92-93). At another point, S.M. testified that at the time she bought the crystal, she was told that it was used to protect people from harmful radiation from computers. (Testimony of S.M., Tr. I, p. 90). The Respondent testified that she recommended that S.M. purchase a crystal only after S.M. rejected a prior suggestion to buy a Polaroid filter screen for her computer for reasons of cost. The Respondent expressly denied that she used a crystal on S.M.'s body in the

course of her treatment of S.M. (Testimony of Respondent, Tr. II, pp. 150, 228-229)

39. Between August 6, 1990 and August 11, 1990, S.M. called the Respondent on the telephone at least twelve (12) times. On each occasion, S.M. was in extreme pain and asked the Respondent to help her. During one of these conversations, on or about August 8, 1990 at approximately 4:00 A.M., the Respondent told S.M. to hold on the line while the Respondent "worked on" S.M. over the telephone. (Testimony of S.M., Tr. I, p. 105)

40. On another occasion during this period, the Respondent called S.M. on the telephone and left a message on S.M.'s answering machine that she had done a "proxy" on S.M., and had discovered some interesting new information which was "for the good of mankind". The Respondent further stated, in the message, that she believed that S.M. had "probably been under pretty heavy attack by negatives" and urged her to block it out. (Testimony of S.M., Tr. I, pp. 124-125; Exh. 19)

41. S.M. testified that the Respondent "treated" her over the telephone on other occasions as well, and described these "treatments" as ones in which both S.M. and the Respondent remained silent for a time and then the Respondent would tell S.M. that she was finished and both parties would hang up. S.M. believed that this was part of her "treatment". (Testimony of S.M., Tr. I, p. 106)

42. The Respondent admitted that she engaged in the use of a "proxy" on S.M., but described it as a situation in which two or more people gathered together to pray about someone who was not present. (Testimony of Respondent, Tr. II, p. 219; Exh. 19)

43. The Board Prosecutor's expert witness, Rand Torman, D.C., testified that there is no accepted chiropractic technique whereby a chiropractor treats a patient by means of a "proxy" procedure, such as was described by the Respondent, or over the telephone. (Testimony of Rand Torman, D.C., Tr. II, p. 66-67)

44. The Respondent presented no expert testimony regarding whether or not it was an accepted practice to treat a patient over the telephone. In fact, one of the Respondent's expert witnesses, Marcia Kasabian, D.C., testified that chiropractic is "hands-on" treatment, and that she was not aware that any such "proxy" procedure was an accepted chiropractic procedure. (Testimony of Marcia Kasabian, D.C., Tr. III, pp. 99, 172)

45. On the basis of the evidence presented, the Board finds that the use of a procedure in which a chiropractor purports to treat a patient over the telephone or in absentia is not an accepted chiropractic treatment technique or supportive procedure.

46. The Respondent had a close professional relationship with a chiropractor named Dr. Melvin Rees. Dr. Rees' main practice was in Kansas and, like the Respondent, he was a member of the International Systemic Health Organization. (Exh. 24)

47. The Respondent admitted that she made arrangements to have Dr. Rees treat S.M. at the Logan Airport Hilton Hotel in Boston, Massachusetts on or about August 11, 1989, and that she also made arrangements to have Dr. Rees treat S.M. at the Respondent's office on or about November 30, 1989. (Testimony of Respondent, Tr. II, pp. 215-216; Exh. 11)

Appendix F

48. On both August 11, 1989 and November 30, 1989, Dr. Rees did in fact perform chiropractic adjustments and treatment on S.M. (Testimony of S.M., Tr. I, pp. 56-59; Testimony of Respondent, Tr. II, pp. 217-218; Exh. 11)

49. The Respondent admitted that Dr. Rees was not licensed to practice chiropractic in Massachusetts at the time he treated S.M. (Testimony of Respondent, Tr. II, p. 216)

50. One of the Respondent's expert witnesses, Ellen Blomerth, D.C., testified that it is not proper to hire or use an unlicensed person to treat patients. (Testimony of Ellen Blomerth, Tr. III, p. 198)

51. During the course of her chiropractic-patient relationship with the Respondent, S.M. had magnetic resonance imaging (MRI) tests performed on her back, at the direction of Dr. Ojermann, on September 13, 1989 and April 5, 1990. (Exh. 6)

52. S.M. provided these MRI files to the Respondent, (Testimony of S.M., Tr. I, p. 54; Testimony of Respondent, Tr. II, pp. 159-160)

53. In September, 1989, the Respondent reviewed S.M.'s MRI films to date with Dr. Rees. The preponderance of the evidence indicates that Dr. Rees expressed the opinion at that time that S.M.'s spinal tumor was healing and that it was being replaced by scar tissue. However, the evidence is inconclusive as to whether the Respondent expressed such an opinion or indicated in any that she concurred with Dr. Rees. Although S.M. testified that the Respondent said that the tumor was healing and that what the doctors were seeing was scar tissue, it is not

clear from the context of this testimony whether the Respondent was expressing her own opinion or merely relaying that of Dr. Rees. (Testimony of S.M., Tr. I, p. 62). The Respondent denied that she ever made any representation that the tumor was healing. (Testimony of Respondent, Tr. II, p. 160)

54. When S.M. attended the ISHO conference in Phoenix, Arizona in late November, 1989, her MRI films were reviewed again by Dr. Rees as part of the presentation of her case to the attendees. At that time, Dr. Rees again expressed the opinion that the MRI films showed that the spinal tumor was healing and that only scar tissue was present. However, there is no evidence indicating that the Respondent expressed any such opinion, and the Respondent expressly denied doing so. (Testimony of S.M., Tr. I, pp. 68-69; Testimony of Respondent, Tr. II, p. 160)

55. In August of 1990, at the time of S.M.'s last office appointment with the Respondent, the Respondent telephoned Dr. Rees, informed him that S.M. was there, and asked Dr. Rees what he could tell them regarding S.M.'s condition. The Respondent then held the telephone receiver so that both she and S.M. could hear Dr. Rees' reply. Dr. Rees responded "Tell S____ there is no tumor, she only thinks there is". However, there is no evidence that the Respondent made this representation. (Testimony of S.M., Tr. I, p. 132)

56. Throughout the course of her chiropractic-patient relationship with S.M., the Respondent was aware of the fact that S.M. had a spinal cord tumor for which surgery had been recommended by S.M.'s medical doctors. Indeed the Respondent spoke with S.M. frequently about her tumor, the proposed surgery and "what her M.D. was doing". (Testimony of Respondent, Tr. II, p. 192; Exh. 7)

57. However, the Respondent admitted that she never had any conversations with any of S.M.'s medical doctors concerning S.M.'s condition or progress, or about the size, location or type of tumor S.M. had. The Respondent further admitted that she never requested permission from S.M. to speak with S.M.'s medical doctors. (Testimony of Respondent, Tr. II, p. 195; Tr. III, pp. 61-63)

58. In late July or early August of 1990, S.M. began experiencing markedly increased pain in her leg and back. Despite this increased pain, the Respondent continued her treatment of S.M. and made no effort to recommend that S.M. consult her medical doctors about her condition until approximately August 9, 1990. (Testimony of S.M., Tr. I, pp. 102, 112-113; Testimony of Respondent, Tr. III, p. 68; Exh. 7)

59. On August 10, 1990, S.M. underwent surgery on an unplanned, emergency basis at Massachusetts General Hospital for removal of the spinal cord tumor, which subsequently proved to be malignant. (Testimony of S.M., Tr. I, p. 113; Exh. 17)

60. The Board Prosecutor's expert witness, Dr. Torman, was of the opinion that if a patient were begin seen by a medical doctor for a condition not susceptible to chiropractic treatment, such as a tumor, but the patient had come to him for pain relief, the appropriate procedure would be to administer limited treatment on a trial basis to see if symptomatic relief was achieved, and to refer the patient back to their primary-care medical doctor if pain relief was not achieved. Dr. Torman also testified that, depending on the severity of the patient's condition, he would have contacted the patient's medical doctors to obtain information about the patient's condition from them and would definitely have done so in a case such as S.M.'s. (Testimony of Rand Torman, D.C., Tr. II, pp. 101-104, 108-109, 116-117)

Appendix F

61. The Respondent's expert witness, Marcia Kasabian, D.C., testified that if confronted with a patient who was in excruciating pain and who had a medical history similar to S.M.'s, she would recommend that that patient go to the hospital. (Testimony of Marcia Kasabian, D.C., Tr. III, pp. 166-167)

62. A licensed chiropractor is required to maintain an accurate treatment record for each patient which details the patient's condition and course of treatment. (Testimony of Rand Torman, D.C., Tr. II, pp. 34, 35, 50)

63. The Respondent admitted that she did not enter a diagnosis in the treatment records she maintained regarding S.M. on the date of S.M.'s initial examination and treatment. (Testimony of Respondent, Tr. III, pp. 40-42)

64. The Board's Prosecutor's expert witness, Rand Torman, D.C., testified that a diagnosis of a patient's condition must be made and entered into the patient's treatment records before treatment actually begins. The Respondent presented no contradictory testimony. (Testimony of Rand Torman, D.C., Tr. II, p. 113)

65. The Respondent admitted that she did not write a treatment plan of any kind for S.M. anywhere in her treatment records on S.M. (Testimony of Respondent, Tr. II, p. 184; Exh. 7)

66. Both the Board Prosecutor's expert witness, Dr. Torman, and one of the Respondent's expert witnesses, Marcia Kasabian, D.C., testified that a written treatment plan is a necessary component of a proper treatment record for a patient. Dr. Torman further testified that such a treatment plan should contain both

short-term and long-term treatment goals. (Testimony of Rand Torman, D.C., Tr. II, p. 23; Testimony of Marcia Kasabian, D.C., Tr. III, p. 114)

67. The Respondent admitted that the "Objective" column in her treatment records on S.M. contained, for each date listed, both her objective examination findings concerning the patient and her description of the treatment performed that day. The Respondent further admitted that one could not tell from examining the record entries where her objective assessment of the patient's condition ended and where her description of the treatment provided on that day began. She stated that she relied on her own memory to distinguish between the objective assessment and the treatment description. (Testimony of Respondent, Tr. II, pp. 155-158, 183; Exh. 7)

68. The Board Prosecutor's expert witness, Dr. Torman, testified that treatment notes should contain notations about the patient's subjective complaints; results of any objective examinations or tests; the practitioner's objective assessment of the patient's condition; notations as to changes in the patient's treatment plan, if any; and a description of the treatment administered. The Respondent did not present any contradictory testimony. (Testimony of Rand Torman, D.C., Tr. II, pp. 34-35)

69. The Respondent admitted that she adjusts her treatment frequency for patients on the basis of the patient's subjective reports of pain. (Testimony of Respondent, Tr. II, pp. 266-267)

70. The Board Prosecutor's expert witness, Dr. Torman, testified that a re-examination of a patient should be conducted every six to twelve visits, or every four to six weeks, in order to determine whether the patient's condition is improving under

the care rendered and whether continued ongoing services are needed. He further testified that the results of such re-examinations should be entered in the patient's treatment record. The Respondent presented no contradictory expert testimony. (Testimony of Rand Torman, D.C., Tr. II, pp. 22-23)

71. Dr. Torman also testified that when he reviewed the Respondent's treatment records on S.M., he found no clearly discernible notations of any regular objective reassessments or reexaminations of S.M.'s condition. (Testimony of Rand Torman, D.C., Tr. II, p. 38)

72. The Respondent admitted that her treatment record entry for S.M. on August 1, 1990 contained references to events which had not occurred on that day. (Testimony of Respondent, Tr. II, p. 198)

73. The Board Prosecutor's expert witness, Dr. Torman, testified that notes and entries in a patient's treatment record should reflect only information obtained on that day. He further testified that if information in a particular entry was received on a day other than the date of the entry, the date of the entry should be the day on which the entry was actually written and the entry should contain a reference to the date on which the information was actually obtained. The Respondent presented no contradictory expert testimony. (Testimony of Rand Torman, D.C., Tr. II, pp. 137-138)

74. Both the Board Prosecutor's expert witness, Dr. Torman, and one of the Respondent's expert witnesses, Ellen Blomerth, D.C., testified that, in summary, the Respondent's treatment records on S.M. were not adequate. (Testimony of Rand Torman, D.C., Tr. II, p. 50; Testimony of Ellen Blomerth, D.C., Tr. III, p. 205)

Appendix F

75. The Respondent admitted that she had a provider contract with Blue Cross/Blue Shield of Massachusetts which specified that patients treated pursuant to that contract were to pay a co-payment of five dollars ($5.00) per office visit. (Testimony of Respondent, Tr. II, pp. 237-238)

76. The Respondent admitted that S.M. paid her ten dollars ($10.00) for some office visits, and that this charge was a co-payment, and did not equal the Respondent's customary full fee for an office visit. (Testimony of Respondent, Tr. II, pp. 238-239)

77. The Respondent testified that these higher charges were for "extra time" and "extra education", and that S.M. agreed to pay them, but later testified that she did not differentiate between patients with respect to the charges imposed for office visits according to the amount of care provided or time spent at a particular office visit. (Testimony of Respondent, Tr. II, pp. 175, 236-237)

78. Both of the Respondent's expert witnesses, Dr. Kasabian and Dr. Blomerth, testified that if a patient is insured by Blue Cross/Blue Shield of Massachusetts and the patient's contract specifies a particular co-payment higher than that specified in the contract is improper. (Testimony of Marcia Kasabian, D.C., Tr. III, pp. 109, 155; Testimony of Ellen Blomerth, D.C., Tr. III, p. 200)

79. The Respondent admitted billing S.M. and Blue Cross/Blue Shield of Massachusetts for the services provided by Dr. Rees. (Testimony of Respondent, Tr. II, pp. 241-243; Tr. III, p. 59; Exh. 11)

Appendix F

80. One of the Respondent's expert witnesses, Dr. Blomerth, also testified that billing for services rendered by an unlicensed practitioner was improper. (Testimony of Ellen Blomerth, D.C., Tr. III, p. 199)

Conclusions of Law

The Board's Amended Order to Show Cause specifically charges the Respondent with: (1) engaging in improper practices which were beyond the proper scope of chiropractic practice, including the use of harmonics and daily affirmations, in violation of Chapter 112, section 89 of the Massachusetts General Laws; (2) improper use of supportive procedures independent of a primary chiropractic procedure, in violation of 233 CMR 4.03; (3) false representations that S.M.'s tumor was merely scar tissue and that it would be improved through chiropractic care, in violation of 233 CMR 4.05, 233 CMR 4.08, 233 CMR 4.09 and 233 CMR 4.13; (4) overutilization of services by treating S.M. on more than 50 occasions over 15 months without significantly improving her condition, altering the course of treatment or referring her to other practitioners; and (5) improperly charging excessive co-payments to S.M. for the care provided to her and her children.

Based on the evidence presented, the Board concludes that the Respondent did in fact engage in practices which are beyond the proper scope of chiropractic, as defined in M.G.L. c. 112, s. 89. First, the evidence clearly establishes that the Respondent used iridology on S.M. as a diagnostic technique allegedly designed to permit her to diagnose the condition of some of S.M.'s internal organs by looking into S.M.'s eyes. This was administered to S.M. during her first office visit, and was part of the Respondent's initial examination of S.M. for which S.M.

was billed. It was the uncontradicted testimony of the Board Prosecutor's expert witness that iridology is not an accepted diagnostic technique in chiropractic and is beyond the proper scope of chiropractic practice.

The Respondent also engaged in the use of so-called "energy healing" or "directing energy" during S.M.'s office visits, a procedure which does not involve any direct physical contact with the patient's body. The evidence not only shows that this procedure was administered during S.M.'s office visits, but that S.M. was provided with a book which explained the procedure and was apparently billed for that volume. All of the expert witnesses who testified in this proceeding, including both of the Respondent's own experts, testified unequivocally that chiropractic involves "hands-on" contact with the patient.

The evidence also shows that the Respondent asked S.M. to repeat at least one daily affirmation, for the express purpose of relieving tension and stress, particularly liver stress, in order to help her body cleanse itself. While the Respondent denied that this was part of her chiropractic treatment per se, it is clear that it was recommended to S.M. during an office visit, that it was recommended in direct connection with the chiropractic treatment S.M. was receiving, and that it was recommended for the purpose of enhancing the effectiveness of that course of chiropractic care. Both the Board Prosecutor's expert witness and one of the Respondent's experts testified that the use of affirmations was not an accepted practice in the chiropractic profession, and the Respondent's other expert conceded that it was "not part of a normal treatment program". In addition, although the Board's own policy statement on harmonics and associated affirmations is not black-letter law, it is persuasive evidence that such a practice is considered to be outside the

scope of chiropractic, and the Respondent acknowledged that she was aware of that policy statement.

Finally, the evidence also supports a conclusion that the Respondent used a so-called "proxy" procedure, purportedly to "treat" S.M. in absentia over the telephone. The Board Prosecutor's expert witness testified that such a procedure was not an accepted chiropractic technique, and neither of the Respondent's experts testified otherwise.

The definition of chiropractic, as set forth in M.G.L. c. 112, s. 89, speaks of the "science of locating and removing interference with the transmission or expression of nerve force in the human body, by the correction of misalignments or for the purpose of restoring and maintaining health." Implicit in this definition is the principle that chiropractic works by correcting the alignment of these structures through direct physical contact with the patient's body. And while the statute recognizes that chiropractors may use other types of supportive procedures or therapy to assist them in reaching this result, the list of supportive procedures and therapies which may be used is not unlimited. Indeed, 233 CMR 4.03, as written at the time of the events involved here, stated very clearly that "the use of supportive procedures MUST AT ALL TIMES be supported by a clinical rationale equivalent to present educational standards as well as usual and customary practices" (emphasis in original). The clear testimony of even the Respondent's own experts was that the techniques and procedures used by the Respondent were outside these boundaries. It is apparent that the Respondent attempted to combine the use of accepted chiropractic techniques and procedures with other alternative healing methods in the course of providing chiropractic care to S.M. While the Board recognizes that patients have the right to seek such alternative

healing methods, such methods do not become a lawful component of chiropractic practice simply because they are used concurrently with accepted chiropractic procedures. The licensed chiropractor is obligated to maintain a careful separation between what is chiropractic and what is not, based on the currently accepted standards of the chiropractic profession regarding the proper scope of practice, and must avoid blurring those boundaries or misrepresenting such alternative healing methods as chiropractic. The Respondent has failed to meet that obligation here, and her failure to do so is conduct which undermines the public's confidence in the integrity of the chiropractic profession. The Board therefore concludes that her actions rise to the level of "gross misconduct in the practice of the profession", within the meaning of M.G.L. c. 112, s. 61. See *Raymond v. Board of Registration in Medicine,* 387 Mass. 708, 443 N.E. 2d. 391 (1982); *Forziati v. Board of Registration in Medicine,* 333 Mass. 125 (1955). For the same reasons, the Board also concludes that the Respondent's conduct constitutes "unprofessional conduct" within the meaning of M.G.L. c. 112, s. 93.

The second specific allegation against the Respondent is that she violated M.G.L. c. 112, s. 61 and 233 CMR 4.03 by improperly using "supportive procedures" independent of primary chiropractic procedure. Since the procedures in question are not accepted supportive procedures either, it necessarily follows that the Respondent also violated the Board's regulations at 233 CMR 4.03 by using procedures which are not "supported by a clinical rationale equivalent to present educational standards as well as usual and customary practices". It is not necessary to reach the question of whether they were used "independent of primary chiropractic procedure".

Appendix F

The third allegation against the Respondent is that she falsely represented to S.M. that the tumor in her spinal column was merely scar tissue and could be improved by the chiropractic treatment provided by the Respondent. It is apparent from the evidence that these representations were actually made by Dr. Rees, not by the Respondent. The Board notes, however, that the Respondent used Dr. Rees, who was not licensed in Massachusetts at the time, to treat a number of her patients, including S.M., and that she billed S.M. for the services of Dr. Rees on two occasions. The performance of chiropractic services by Dr. Rees without a Massachusetts license is clearly violative of M.G.L. c. 112, s. 95, and the Respondent's participation in such activities by arranging for Dr. Rees to care for her patients and billing for his services is equally improper. However, since these matters were not specifically alleged in the Board's Order to Show Cause, the Board must decline to conclude that a violation of law actually occurred with respect to these matters.

The fourth specific allegation in the Order to Show Cause charges the Respondent with violating M.G.L. c. 112, s. 61, and engaging in overutilization of services in violation of 233 CMR 4.06 as well, by treating S.M. on more than 50 occasions over a 15-month period without significantly improving her condition, properly altering her course of treatment or making necessary referrals to other practitioners. The evidence shows that the Respondent adjusts her frequency of treatment on the basis of a patient's subjective reports of pain, and that her treatment records regarding S.M. failed to contain evidence of periodic objective re-examinations of S.M.'s condition. However, the evidence also indicates that S.M. was being treated for pain relief on an "as needed" basis and at rather irregular intervals. It is therefore unclear that the treatment provided was "excessive in quality or amount to the needs of the patient" and therefore not sufficient

to permit a conclusion that the Respondent engaged in overutilization of services, as defined in the version of 233 CMR 4.06 in effect at the time. The Board notes, parenthetically, that the evidence shows a number of substantial deficiencies in the content of the Respondent's treatment records, but declines to decide whether such deficiencies violated 233 CMR 4.04 since no allegation to this effect was made in the Board's Order to Show Cause.

However, it is clear from the record that the Respondent did not confer with the medical doctors who were providing care to S.M. for the spinal tumor at any time during the course of her treatment of S.M., and never made any attempt to seek authorization from S.M. to do so. The Board Prosecutor's expert witness testified that the appropriate course of action under these circumstances would have been to administer treatment for pain relief purposes for a short period of time on a trial basis and refer the patient back to their medical doctor if pain relief was not obtained. He also testified that consultation with the patient's medical doctors should have been undertaken in a case where, as here, the patient had a spinal tumor of unknown origin. The Board is of the opinion that the subsequent determination that the tumor was malignant underscores the need for such consultation. Given the absence of any contradictory testimony from the Respondent's experts, the Board concludes that the Respondent's failure to seek authorization to confer with S.M.'s medical doctors was improper and sufficiently grave to rise to the level of "gross misconduct in the practice of the profession", within the meaning of M.G.L. c. 112, s. 61.

Finally, with respect to the allegation that the Respondent improperly charged S.M. a co-payment in excess of the amount permitted by the patient's insurance company, the evidence

clearly substantiates the charge. The Respondent conceded both that S.M.'s Blue Cross/Blue Shield contract specified a co-payment of $5.00 and that she actually charged S.M. a co-payment of twice that amount. Such a practice is, according to the Respondent's own expert witness, improper, and the Board concludes that it constitutes both "gross misconduct in the practice of the profession" within the meaning of M.G.L. c. 112, s. 61, and "unprofessional conduct" within the meaning of M.G.L. c. 112, s. 93.

Order

Based upon the foregoing Findings of Fact and Conclusions of Law regarding the Respondent's use of improper practices which are beyond the scope of chiropractic; her use of techniques and procedures which are not properly "supportive procedures"; her failure to consult with S.M.'s medical doctors or seek authorization from S.M. to do so; and her improper charging of an excessive co-payment; the Board hereby ORDERS that the license of Catherine Sears, D.C. to practice chiropractic in the Commonwealth of Massachusetts (License Number 475) is hereby REVOKED, effective upon the date of the Respondent's receipt of this Final Decision and Order. The Respondent shall surrender her license certificate to the Board within seven (7) days after her receipt of this Final Decision and Order.

Notice of Appeal Rights

You are hereby notified that you have the right to appeal this Final Decision and Order, pursuant to G.L. c. 30A, s. 14, within thirty (30) days from the date of your receipt of this Final Decision and Order.

Appendix F

Board of Registration
of Chiropractors

s/ Edward J. Barowsky, D.C.
Edward J. Barowsky, D.C.
Chairman

Dated: March 8, 1995
Certified Mail Number: Z 788 892 362